Supreme Court, U.S.
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87-1434
No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

TERRI LYNN SCRAPE,

Petitioner,

vs.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a warrantless search for suspects at a murder scene violates a criminal defendant's Fourth Amendment rights where the search includes photographing, video taping and dusting for fingerprints in the house in which the homicide occurred.

2. Whether Petitioner is denied due process of law when the doctrine of inevitable discovery is raised by the State for the first time on Appeal, when Petitioner has no opportunity to present evidence regarding that theory to support the admissibility of evidence obtained in an unconstitutional search.

3. Whether California's rule of per se inadmissibility of testimony by a person previously hypnotized

violates due process of law when applied against a witness in a criminal action whose testimony is critical to the defense of a defendant.

4. Whether Petitioner's conviction is so totally devoid of evidentiary support as to render it a denial of due process.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The unpublished opinion of the Court of Appeal of California filed August 25, 1987 is set forth in full in Appendix "A" to the Petition for Writ of Certiorari.

The Order of the Supreme Court of California filed December 2, 1987 denying Petitioner's Petition for Review is set forth in full in Appendix "B" to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner's Petition for Review to the Supreme Court of California was denied on December 2, 1987. An extension up to and including March 1, 1988 within which a Petition for Writ of Certiorari to the United

States Supreme Court must be filed was entered on January 21, 1988. Jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. 1257 on the grounds that a right or privilege of the Defendant is claimed under the Constitution of the United States which right has been denied by the State.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and

particularly describing the place to be searched, and the person or things to be seized.

Constitution of the United States
Amendment 14

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On Sunday, May 13, 1984 at approximately 3:40 a.m., Terri Lynn Scrape found her husband lying in a pool of blood in the livingroom of their house. Mrs. Scrape went to a neighbor's home for help. When the police arrived, four officers searched the premises for suspects, finding no one other than the victim's dead body.

Mrs. Scrape was taken to the police station for questioning. There she told the officers that she and her husband had spent a romantic evening at home, drinking, dancing and making love in the livingroom where they both had fallen asleep. At 1:00 a.m., Terri Scrape got up, took a shower in her bathroom and

fell asleep on the bed in her bedroom waiting for her husband. She woke up, realized that her husband was not there and went looking for him. She found him covered in blood in the livingroom and she ran out to her neighbor. Mrs. Scrape was not a suspect at that point.

While Defendant was at the police station and after the officers who first arrived at the house had searched for suspects, police investigators went to the Scrape residence. The investigation crew took photographs, video taped portions of the house and dusted for fingerprints. The investigators remained at the house for some seven to eight hours.

The next day, Mrs. Scrape met with the police at the Scrape resi-

dence for the purpose of seeing what had been missing and moved. While at the house, Mr. and Mrs. Parkinson informed the police that they had heard a violent argument at the Scrape residence between 3:00 a.m. and 3:40 a.m. on May 13, 1984. The argument involved two male voices and one female voice.

At this point, Mrs. Scrape became a suspect. A search warrant was obtained to examine the house on Wednesday, May 16, 1984. The search revealed a paring knife consistent with the stab wounds on Mr. Scrape's chest and back which, when tested, revealed traces of Type A blood, the same type as the victim's. Testing on a fireplace poker discovered during the officers' search

of the premises when first called to the scene, also revealed traces of Type A blood.

Also during the search on Wednesday, a spot of Type A blood was found on a hamper, and a dimmer switch in the livingroom tested weak positive for the presence of blood.

Blood spatter analyses of photographs of the crime scene indicated that the scene had been altered after the killing.

Mrs. Scrape was charged with murder through the use of a deadly and dangerous weapon, a knife or a fireplace poker.

The Prosecutor's theory at Trial was that the murder occurred during a lover's triangle fight between the Petitioner, the Dece-

dent and a man by the name of Anthony Phillips. Petitioner and her husband are both white; Phillips is black. According to the Prosecutor, Petitioner stabbed Mr. Scrape with a knife while Phillips hit him with the poker. The scene was then altered to make it look like the couple had spent a romantic evening together; Petitioner took a shower and Phillips left before Petitioner ran to her neighbor's house for help.

Prior to Trial, Petitioner's counsel moved to suppress all evidence obtained by the investigators during their warrantless search of the premises on May 13, 1984. The Trial Court denied the Motion on the ground that the initial search at the house was to secure a crime scene and

was in the early investigative stages of the matter.

At Trial, the Prosecution called Mr. and Mrs. Parkinson. A few months after they first informed the police that they had heard an argument, they informed the police that one of the male voices had an ethnic accent, either black or hispanic. At some point, both had heard that one of the suspects was a black male. Thereafter, at Trial, both testified that one of the voices they heard was that of a black man. They further testified that the black voice and the female voice were directed against the white male voice in the argument. Mr. Parkinson also testified that he remembered hearing at the time every word of the argument but he could not

later recollect them.

Petitioner was convicted by the jury of second degree murder through the use of a deadly and dangerous weapon. In moving for a new trial, Petitioner requested that the Trial Court order hypnosis of the Parkinsons to aid in their recalling the words they heard from the Scrape residence on the night of the murder. The Trial Court denied this request; judgment was entered and Petitioner was sentenced to a term of sixteen years to life.

Petitioner appealed to the Court of Appeal of the State of California which affirmed the judgment. Petitioner thereafter petitioned for review to the California Supreme Court. The Petition was

denied.

The points raised here on appeal were raised in the Trial Court, the State Appellate Court and the State Supreme Court, where applicable.

SUMMARY OF ARGUMENT

The warrantless search for suspects at Petitioner's house was overbroad and violated the Petitioner's Fourth and Fourteenth Amendment rights and the Trial Court's admission of evidence obtained during the search was erroneous.

Petitioner was denied due process of law in that she was not given notice or the opportunity to present evidence regarding whether or not the evidence obtained in the unconstitutional search of her home was admis-

sible under the doctrine of inevitable discovery.

The Trial Court's Order denying Petitioner the right to conduct hypnosis of witnesses constitutes a denial of due process of law in that it denied Petitioner the right to present evidence on her own behalf.

ARGUMENT

I.

THE WARRANTLESS SEARCH OF THE MURDER SCENE WAS UNCONSTITUTIONAL

After Petitioner's residence had been searched for suspects and while Petitioner was at police headquarters, investigators from the police department, without warrant, descended upon Petitioner's home. Over a seven to eight hour period, at least three

detectives, two photographers, two print men and three video tapers combed the house. They took photographs, video taped the house and dusted for and obtained fingerprints, all of which, along with other observations made by some of the detectives, were introduced at Trial.

The search by the investigators was unconstitutional. At the scene of a murder, police may only make a prompt, warrantless search to see if there are other victims or if the killer is on the premises. Thompson v. Louisiana, 469 US 17, 83 L.Ed.2d 246 (1984); Mincey v. Arizona, 437 US 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

In both Thompson and Mincey, warrantless searches were conducted

and evidence obtained, after the homicide scenes had been searched for suspects. Not being incident to a search for suspects, these searches were held to be unconstitutional.

The same conclusion must be reached here. The search here by a team of homicide investigators was not for the purpose of finding out whether the suspect was on the premises. Instead, police conducted a general exploratory search for evidence after it was determined that no suspects were present. Not having obtained a warrant, the search was unconstitutional.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT SHE WAS NEVER GIVEN NOTICE OR THE OPPORTUNITY TO PRESENT EVIDENCE AS TO WHETHER THE EVIDENCE OBTAINED IN THE UNCONSTITUTIONAL SEARCH OF PETITIONER'S HOME WAS ADMISSIBLE ON THE THEORY OF INEVITABLE DISCOVERY.

Evidence obtained in an illegal search may nonetheless be admissible if the prosecution proves by a preponderance of evidence that the information inevitably would have been discovered by lawful means. Nix v. Williams, 467 US 431, 104 S.Ct. 2501, 81 L.Ed.2d, 377 (1984).

In the instant case, Petitioner moved to suppress all information obtained in the warrantless search of her home. The Trial Court did not apply the inevitable discovery doctrine nor was the doctrine raised.

Instead, the Trial Court found that the search was proper because it was to secure a crime scene and was in the early stages of investigation. The Trial Court refused to suppress the evidence.

The inevitable discovery doctrine was first raised by the State on appeal. In its decision, the California Court of Appeal concluded that this case was distinguishable from Thompson and Mincey in that the evidence was consequently admissible, because it would inevitably have been discovered.

Not having notice in the Trial Court that the inevitable discovery doctrine was in issue, Petitioner was denied a full, fair and impartial hearing on the matter.

The evidence obtained in the illegal search was critical to the State's case. Photographs of the scene were used to show that the scene had been altered after the killing. The observations and photographs of water droplets in the shower were used to show that Petitioner had taken a shower not at 1:00 a.m., as she contended, but much later, just after the murder.

The State was required to prove that they would inevitably have discovered the information obtained in the illegal search. Because no hearing was ever held, the State was never required to show, for example, that they would have discovered droplets in the shower in a lawful manner.

The failure to provide Petitioner

a hearing on the question of inevitable discovery was a fundamental denial of Petitioner's due process rights. Singleton v. Wulff, 428 US 106, 120-121, 96 S.Ct. 28, 68 (1976); Armstrong v. Manzo, 380 US 345, 552, 85 S.Ct. 1187 (1965).

III.

THE REFUSAL TO ALLOW PETITIONER TO HYPNOTIZE WITNESSES WAS A DENIAL OF DUE PROCESS.

The testimony of Mr. and Mrs. Parkinson was the only evidence to place Petitioner, her husband and Phillips at the Scrape residence at the time of the killing. Their testimony was also the only evidence to show a violent argument among the three at that time.

Neither individual could recall at Trial any of the words they had overheard. After Trial, Petitioner requested that the Parkinsons be ordered to submit to hypnosis to refresh their memory. The request was denied.

The California Court of Appeal upheld the denial of this request based on the case of People v. Shirley, 31 Cal.3d 18, 723 P.2d 1354 (1982). Under Shirley, California adopted a per se rule that a person may not testify as to any events that were the subject of questioning during hypnosis.

In light of the recent case of Rock v. Arkansas, ___US___, 107 S.Ct. 2705, 97 L.Ed.2d 37 (1987), Cali-

fornia's per se rule precluding a witness' hypnotically refreshed testimony is improper.

In Rock, the Court rejected Arkansas' rule excluding all hypnotically enhanced testimony when it applied to a criminal defendant's testimony. The Court held that the State had not shown that hypnotically enhanced testimony is always so untrustworthy and so immune from being evaluated for credibility that a defendant cannot testify at Trial.

The Court in Rock specifically left open the question as to whether a per se exclusion rule could apply to hypnotized witnesses other than the defendant. Petitioner submits that the answer is no.

A criminal defendant's right to

present a defense includes not only the Constitutional right to testify in his own behalf but also the Constitutional right to present evidence in his behalf. Washington v. State of Texas, 388 US 14, 18-19, 87 S.Ct. 1920, 1923 (1967).

California's per se rule excluding the testimony of a hypnotized witness exhibits the same problems that were addressed by the Court in Rock. It impinges on a defendant's Constitutional rights by precluding all posthypnotic testimony sought to be introduced on a defendant's behalf as unreliable without showing that posthypnotic testimony is always so untrustworthy and so incapable of having its credibility judged that it must be excluded. Therefore, as

in Rock, California's per se rule is also unconstitutional. The failure of Petitioner to be allowed to obtain all relevant evidence is a denial of due process.

IV.

PETITIONER'S CONVICTION IS SO DEVOID OF EVIDENTIARY SUPPORT THAT IT IS A DENIAL OF DUE PROCESS.

A conviction that finds no support in the record is void as a denial of due process. Thompson v. City of Louisville, 362 US 199, 204, 80 S.Ct. 624, 628, 4 L.Ed.2d 654 (1960). Such is the case here.

The case against Petitioner was so fraught with uncertainty and unsupported by the evidence that the conviction denied her due process. At most, the evidence showed that

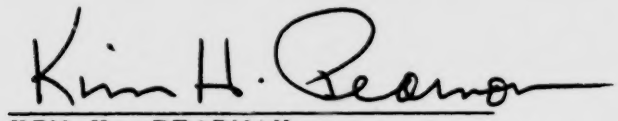
Petitioner was present at the killing and perhaps had a motive and the opportunity to kill her husband. However, there was a complete lack of evidence showing that Petitioner murdered her husband either with a knife or a fireplace poker or by any other means.

Similarly, the evidence does not show that Petitioner aided or abetted anyone else in the killing of her husband.

CONCLUSION

The judgment should be reversed.

Respectfully Submitted,



KIM H. PEARMAN

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TERRI LYNN SCRAPE, Defendant and Appellant.	No. B015302 (Super.Ct.No. A 807562) COURT OF APPEAL - SECOND DIST. F I L E D AUG 25 1987 ROBERT N. WILSON Clerk .... Deputy Clerk

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APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Affirmed.

Kim H. Pearman, for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Gary R. Hahn, Supervising

Deputy Attorney General, Robert R. Anderson, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant Terri Lynn Scrape appeals from the judgment of conviction following a jury trial of second degree murder (Pen. Code, § 187) of her husband, Andy Scrape, through use of a deadly and dangerous weapon (Pen. Code. § 12022, subd. (b), to wit, a knife and/or fireplace poker. Defendant was acquitted of first degree murder. Defendant raises a host of contentions on appeal,[1/] all of which we find lack merit. Affirmed.

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1. Defendant contends: (1) the

evidence is insufficient to support the judgment; (2) the evidence is insufficient to support the Penal Code section 12022, subdivision (b) finding; (3) the section 1538.5 motion to suppress evidence obtained at the time of the initial investigation and prior to the issuance of the search warrant was improperly denied; (4) the court improperly admitted evidence obtained as a result of investigative work conducted during the trial; (5) the court improperly admitted evidence that defendant was having an affair with Anthony Phillips; (6) the court improperly admitted evidence concerning payment of money by defendant to Phillips for cocaine; (7) the court improperly admitted evidence concerning the incidence of nighttime burglaries of occupied dwellings in the area of victim's and defendant's home; (8) the court improperly admitted evidence of a loud argument at defendant's and victim's home shortly before the murder, including the fact that one of the voices belonged to a Black male (Anthony Phillips is Black); (9) the trial court improperly failed to give a voluntary manslaughter instruction given evidence of defendant's alcohol consumption; and (1) the trial court should have granted defendant's post-conviction request that the neighbors who testified to the argument be hypnotized in an effort to aid their recollection.

FACTS

At approximately 3:40 a.m. on Sunday, May 13, 1984, defendant ran to her neighbor's home for help in calling the police because she had seen her husband lying in a pool of blood in their living room. When police and paramedics arrived, defendant stated her husband was hurt and people could still be inside. The officers searched the premises for suspects, finding only victim's dead body. The dining room sliding glass door to the back yard was partially open, and a fireplace poker, gym bag, tennis racket, towel, and a pair of pants were found on the back lawn. The poker, which

had blood on it, was consistent with the multiple blows to Andy Scrape's head. The front gate, usually locked, was open.

Defendant, who was dressed in a robe and whose hair was wet as if it had just been washed, was taken to the station for questioning. There, she was informed that her husband was dead. She related that after cooking dinner together, she and her husband had spent a romantic evening watching television, dancing, drinking champagne, making love and sleeping in front of the fireplace in the living room. At about 1 a.m., she got up, took a shower, put on a robe, and fell asleep on the bed, while waiting for her husband. She woke, realized the lights and stereo

were still on and that her husband had not come to bed, and went to look for him. As she walked across the living room she thought he was asleep on the floor; when she turned on the dining room light, she saw he was covered with blood. Realizing he was hurt, she ran out of the house. While she claimed she did not go over to him or touch him, she later told people that "he was so cold". An officer examined defendant's arms and legs and found no signs of injuries.

While defendant was questioned at the station, police investigators photographed and videotaped parts of the house and dusted for fingerprints. The bed did not appear to have been slept in, and the shower

was wet. There were signs of a struggle in the living room.

The next morning, Monday, defendant met police at the house, as prearranged, for the purposes of walking through to see what was missing and moved, and to conduct further fingerprint testing of the premises. They looked unsuccessfully for Andy Scrape's missing necklace and wallet. The house had not been ransacked.

While at the house on Monday, the investigating officer was approached by a neighbor, Mrs. Parkinson, who indicated she had heard a loud argument at the house at about 3:00 a.m. Sunday morning. Monday evening, Mr. and Mrs. Parkinson were interviewed at the station and

related hearing a violent argument involving two male and one female voices, and the sounds of heavy furniture being moved or thrown about. Mr. Parkinson also heard a car leaving, and then a female voice stating: "He's been killed." This occurred between about 3:00 a.m. and 3:40 a.m.

At this point, defendant became a suspect in the killing. On the following day, Wednesday, police criminalists examined the house pursuant to a search warrant. A paring knife, with a three-inch blade consistent with the stab wounds on Andy Scrape's chest and back, was found in the dishwasher. The blade appeared to have butter or margarine on it. In comparison, the other

utensils in the dishwasher were clean. Chemical testing of the blood on the knife and on the poker revealed traces of human, type A blood, the same type as Andy Scrape's.

Also, in the master bedroom bathroom, a spot of blood was found on the hamper. The dimmer switch in the living room tested weak positive for the presence of blood. Testing of the entry way floor revealed partial bloody footprints that appeared to possibly go toward the hallway leading to the bedrooms.

Blood spatter analysis of photographs of the crime scene indicated the scene had been altered after the killing. Apparently the ice bucket, ice, and pillows were

not there at the time of the blood-letting. Also, blood found above the fireplace indicated, consistent with blood trails on Andy Scrape's body, that he had been standing when at least some of the blood letting had occurred. Blood swipes on the body indicated the pants and shoes had been removed.

The autopsy revealed about seventeen blows to the head with an object consistent with the poker, which fractured the skull in several places and caused hemorrhaging and bruising of the brain. One blow with an object consistent with the poker, broke the thyroid cartilage of the neck. Any of these blows could have been fatal. Four stab wounds with an object consistent

with the paring knife were found on the chest, along with superficial wounds on the arms and face. One of the wounds to the heart was fatal, as was a stab wound to the back. All wounds were inflicted while Andy Scrape was alive.

All prints were identified with the exception of a print from the sliding glass door which lacked enough points to make a comparison.

A few months after the killing, the Parkinsons informed the detective that one of the male voices had an ethnic accent, either Black or Hispanic. By the time of trial, both testified that the accent was Black. At some point, both had heard that one of the suspects was a Black male, defendant's alleged

lover. Mr. Parkinson testified he remembered hearing at the time every word of the argument, but could not later recollect them. He recalled that the Black voice and the female voice were directed against the white male voice in the argument. Mrs. Parkinson testified she did not make out the words.

Evidence was presented to indicate Andy Scrape had discovered and was upset about defendant's affair with Black coworker, Anthony Phillips. About one month prior to his death, Andy Scrape and a friend drove to defendant's office and observed defendant and Phillips hugging and kissing in the parking lot. Defendant and Andy Scrape appeared to argue, then Andy Scrape and his

friend left. Evidence was also presented to indicate defendant had, unbeknownst to Andy Scrape, given $1,000 to Phillips to invest in cocaine, but that the deal had fallen through. A paper in Andy Scrape's underwear drawer with figures totalling up to $1,000 was found after his death.

Telephone records showed that two calls had been placed to Phillips' bepper number from defendant's and Andy Scrape's home at 9:30 and 9:54 p.m. on the night of the killing.. A tape recording of Phillips' voice was played to the jury for the purpose of determining his accent.

After the killing, Phillips visited defendant, who prior to her

arrest on June 7, 1984, was staying with friends and was seen embracing her on the living room sofa one night after the others had gone to bed.

The prosecution's theory was that the argument heard by the Parkinsons' was a lover's triangle fight between defendant, Phillips, and Andy Scrape, and could also have involved the $1,000 cocaine deal. The prosecutor argued to the jury that the evidence supported the inference that defendant ran to the kitchen and brought to the living room the paring knife, which she used to stab her husband in the back while he was struggling with Phillips. Phillips then grabbed the poker and engaged in a frenzied

attack on Andy Scrape's head, while defendant stabbed him several more times. The scene was then altered to make it look like the couple had spent a romantic evening together, defendant took a shower, and Phillips left before defendant ran to her neighbor's for help.

In support of her testimony of spending a romantic evening together and then falling asleep in the bedroom while the killing occurred, defendant introduced evidence of a sound test conducted in the house under circumstances intended to reconstruct the scene as described by defendant. The test indicated that noise ranging from ninety-five decibels could be heard in the Scrapes' bedroom or in the Parkinsons' bed-

room.

Defendant's father and step-father testified that on the Monday after the killing, a detective took a small paring knife with a two or three-inch blade from a kitchen drawer, placed it in a plastic bag, and dropped it into a briefcase. This allegation was denied by the detective involved, who also indicated that a plastic evidence bag would not have been used for a knife.

Finally, several of defendant's friends, including a former spouse, testified to her good character and non-violent personality.

DISCUSSION

A. The judgment is supported by substantial evidence

Defendant's contention that the evidence is not sufficient to support a finding of second degree murder and of use of a deadly weapon is without merit. Whether defendant committed the crime and used the weapon(s) are questions of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment. (People v. Mitchell (1986) 183 Cal. App.3d 325, 329.) We conclude, after reviewing the record with the above in mind, that substantial evidence supports the judgment, that a reasonable trier of fact could find

defendant guilty beyond a reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557, 576.)

The prosecution's theory, that defendant and Phillips, wielding separate instruments, both struck fatal blows and thus aided and abetted each other in the killing, is amply supported by the evidence. The evidence clearly establishes defendant's "presence at the scene of the crime, companionship and conduct before and after the offense," (People v. Mitchell, supra, 183 Cal. App.3d at p. 330), sufficient to support the verdict.

Given the lateness of the hour and the location of the crime, it is reasonably inferrable that the female voice heard by the Parkinsons was

defendant's, and one of the male voices was Andy Scrape's. It is also reasonably inferable that the Black male voice was Phillips. The record indicated Andy Scrape had discovered not only the affair between Phillips and defendant, but also that $1,000 was missing. Moreover, Phillips' number was dialed twice from the Scrapes' home several hours before the killing.

Given the evidence placing defendant and Phillips in the home at about 3:00 a.m., during a violent argument in which their vioces were directed against Andy Scrape's, it is reasonable to infer that defendant and Phillips attacked him simultaneously. The jury could reasonably have inferred from the facts that

(1) Andy Scrape, although fatally injured numerous times, was alive throughout the brutal attack, and (2) the blows to the heard were part of the frenzied attack whereas only four stab wounds were inflicted, that two persons attacked him, rather than just one. The absence of any physical injuries on defendant's body is consistent with this inference because presumably defendant, given her husband's size and strength, would not have been able to escape unscratched had she attacked him alone.

Inasmuch as the killing occurred in defendant's home, it is also inferrable she, with knowledge of location of items, altered the scene of the crime, and cleaned,

buttered, and put away the knife in the dishwasher. Moreover, she was the most likely person to have left the drop of blood in the bathroom before shower, as her hair was wet when she was talking to the neighbors.

In short, the record contains ample evidence of motive (People v. Gonzales (1948) 87 Cal.App.2d 867, 877), opportunity (People v. Baker (1928) 94 Cal.App. 628, 633), and a consciousness of guilt evidenced by the attempt to conceal the act (People v. Peete (1921) 54 Cal.App. 333, 346). All these factors may be legitimately considered by the jury in inferring defendant's identity as the perpetrator of the crime.

B. The Section 1538.5 Motion Was Properly DEnied

Defendant's contention that the trial court improperly denied her motion to suppress evidence obtained prior to the issuance of the warrant is meritless. The seizure of the poker, and the photographing and videotaping of the residence immediately after the crime was reported were permissible plain view activities. Moreover, these activities including fingerprint dusting produced evidence which would in any event have been recovered the next day during the consent search of the house and was therefore admissible. (In re Javier A. (1984) 159 Cal.App.3d 913, 926.) Defendant's reliance on Thompson v.

Louisiana (1984) 469 U.S. 17, and Mincey v. Arizona (1978) 437 U.S. 385, is therefore misplaced.

Defendant's other contention that she did not give consent to the search is also meritless. The question is factual, and the trial court's determination will be upheld if supported by substantial evidence. (People v. Martino (1985) 166 Cal. App.3d 777, 791.) Here, Officer Cuillard's testimony and defendant's conduct and cooperation support the trial court's finding of a consent search.

C. Admission of Evidence Obtained During Trial Was Proper

Defendant's contention that the court improperly admitted evidence

obtained through analyses conducted after the trial began is meritless. Defendant has failed to meet her burden of establishing prejudice from the lack of timely discovery. (People v. Claxon (1982) 129 Cal. App.3d 638, 657-658.)

The challenged evidence, obtained through bed sheet, cat hair, fingerprint, and blood stain pattern analyses conducted after the trial began, was based on physical evidence recovered before trial and available to defendant. We find no evidence of prejudice based on the analyses of these items after the beginning of trial.

The bed sheet and cat hair analyses were not emphasized or commented on at trial, based on our

review of the record.

The fingerprint analysis consisted of reexamination of previously unmatched prints, resulting in the matching of all prints save those that lacked sufficient points of comparison. Although defense counsel in opening argument had pointed out that some of the prints were unmatched, the jury was later informed that defense counsel had not intentionally misled the jury in so stating because at that time there really were unidentified prints.

And the prosecution's blood stain pattern analysis based on examination of photographs of the crime scene could have been met by defendant's own expert, Keith Inman. It

is established that the proper remedy for failure to disclose is to permit the complaining party an opportunity to meet the new evidence. (People v. Reyes (1974) 12 Cal.3d 486, 501-502.) Here, Inman testified that it would take him five to fifteen hours to examine the photographs and read the prosecution's two-page blood pattern analysis report. Although Inman testified that he could probably maneuver the time necessary to conduct this examination prior to being called to testify, he did not do so.

We therefore conclude defendant was not prejudiced by the late discovery of evidence.

D. Evidence Concerning the Affair with Phillips and Cocaine Usage Was Properly ADmitted

Defendant contends the court erred in denying her motion in limine to exclude evidence concerning her alleged affair with Phillips and her alleged cocaine usage pursuant to Evidence Code section 352. Defendant argues, based on People v. Green (1980) 27 Cal.3d 1, that the court committed reversible error in that the record fails to affirmatively show the trial judge did in fact weigh prejudice against probative value. (Id., at p. 25.) We disagree.

Where, as here, the trial court was undoubtedly aware that the evidence in question was imbued with the substantial danger of prejudice

that is inherent in proof of an extramarital affair between a White woman and a Black man, and drug usage, and where the issue of whether the probative value of the evidence outweighed its prejudicial effect was before the court and plainly formed the basis of its ruling admitting the evidence the court's omission to recite for the record its implied finding that probativeness outweighed prejudice did not result in a miscarriage of justice. (People v. Frank (1985) 38 Cal.3d 711, 732.) Accordingly, any alleged error was harmless. (People v. Watson (1956) 46 CA1.2d 818, 836.)

E. Evidence Concerning the Incidence Of Hot Prowl Burglaries Was Proper

Defendant's contention that evidence of the small percentage of night time or hot prowl burglaries was prejudicial , speculative and immaterial is meritless. The testimony by a twenty year veteran of the Van Nuys Division of the Los Angeles Police Department, which includes the area of the Scrape residence, was that 95% of residential burglaries are committed before 9:00 p.m., and that the remaining 5% were nighttime burglaries. He further testified that a hot prowl burglar usually works alone and would if contronted, flee; residential robbers usually don't work alone and are usually armed with a gun. This evidence was

relevant and material evidence to assess the credibiliity of defendant's explanation that an outsider entered the home, removed Andy Scrape's wallet, necklace, and athletic equipment, was confronted by Andy Scrape, and killed him with the poker and knife. There was no abuse of discretion in determing the relevancy of this evidence. (People v. Reeve (1980) 105 Cal.App.3d 444, 452.)

Defendant's other argument that the officer's testimony amounted to an impermissible assessment that the statistical probability of defendant's guilt was 95%, in violation of People v. Collins (1968) 68 Cal. 2d 319, 320, is misplaced. Here there was no evidence of a statistical probability as to defendant's

guilt.

F. The Parkinsons' Testimony Was Properly Admitted

Defendant contends the testimony of the Parkinsons concerning the following matters should have been excluded following Evidence Code section 402 hearings: the ethnicity of the voices, the sex of the voices, the precise number of the voices, the precise location of the voices, the belief that the two female voices were the same (the voice in the argument and the voice stating "he's dead"), the opinion that the female was yelling at the white male, and the opinion that the squealing tires were leaving the Scrape residence. We disagree.

The trial court's decision to admit the Parkinsons' testimony concerning the above listed matters was clearly a proper exercise of discretion. Their testimony was properly admitted as both rationally based on their perceptory sense of hearing, a proper basis for identification type testimony (Connell v. Clark (1948) 88 Cal.App.2d 941, 947), and as opinion testimony pursuant to Evidence Code section 800. to be admissible, evidence neet not absolutely confirm anything. (People v. Peggese (1980 102 Cal.App.3d 415, 420.) The weight to be given their testimony was for the jury's determination. (People v. Deletto (1983) 147 Cal.App.3d 458, 478.)

The court's alleged failure to

recite for the record its implied finding that the probative value outweighed prejudice does not constitute a miscarriage of justice. (People v. Frank, supra, 38 Cal.3d 711, 732.) The trial court explicitly stated that it had read and considered defendant's written motion in limine, which expressly raised the Evidence Code section 352 argument. In the face of a clear showing that the evidence was properly received, the court's omission to recite for the record its implied finding did not result in a miscarriage of justice. Accordingly any error was harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

G. The Involuntary Manslaughter Instruction Was Not Warranted

The trial court's refusal of defendant's requested involuntary manslaughter instruction was not error. The record fails to support her alleged inability to harbor intent to kill because of voluntary intoxication. (People v. Ray (1975) 14 Cal.3d 20, 31.) Moreover, the diminished capacity defense is no longer available. (People v. Ventura (1985) 174 Cal.App.3d 784, 788-790.)

H. The Post-Conviction Hypnosis Request Was Properly Denied

Defendant's post conviction motion to order the Parkinsons to undergo hypnosis for the purpose of assisting their recollection of the

words they may have heard during the argument they overheard was properly denied. In California, a person hypnotized for investigative purposes may not testify as a witness to the events that were the subject of questioning during hypnosis. (People v. Shirley (1982) 31 Cal.3d 18, 68.) Authorities cited by defendant from other jurisdictions are inapplicable.

DISPOSITION

The judgment is affirmed.

not for publication.

THOMPSON, J.

We Concur:

LILLIE, P.J.

JOHNSON, J.

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 7, No. B015302
S002618

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

TERRI LYNN SCRAPE

SUPREME COURT
FILED
DEC 2 1987
Laurence P. Gill,
Clerk

DEPUTY

Appellant's petition for review DENIED.

LUCAS

Chief Justice